No. 85-1874

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

BARTEL DENTAL BOOK CO. INC. and MAPLETON HOUSE BOOKS, INC.,

Petitioners,

vs.

PETER J. SCHULTZ, DORMITORY AUTHORITY OF THE STATE OF NEW YORK and EDWARD A. PICHLER, SHERIFF OF THE CITY OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it was proper to impose sanctions under Federal Rule of Civil Procedure Rule 11 when part of a complaint has been held not to be frivolous and the filing of the complaint obtains a beneficial result.

2. Whether the courts below erred in holding that petitioners were not entitled to due process to determine the proper relocation costs after property was taken by eminent domain.

3. Whether the courts below erred in dismissing an equal protection claim on a pre-answer motion on the basis that there was a failure to establish facts.

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Citations iii

Opinions Below 2

Statement of Jurisdiction 2

Constitutional Provisions and Statutes Involved 2

Statement of the Case 2

A. The Proceedings 2

B. The Facts 3

Reasons for Granting the Writ:

I. Awarding Rule 11 sanctions is punitive and is in conflict with its purpose. 6

II. The Second Circuit's holding that petitioners were not entitled to due process is contrary to the well established law of this Court and the Constitution. 8

III. The dismissal of an equal protection claim by a pre-answer motion on the basis that there was a failure to establish facts was a clear departure from the accepted and usual course of judicial proceedings. 11

Contents

Page

Conclusion 13

TABLE OF CITATIONS

Cases Cited:

Allen v. McCurry, 449 U.S. 90 (1980) 12, 13

Armstrong v. Manzo, 380 U.S. 545 (1965) 10

Bell v. Burson, 402 U.S. 535 (1971) 10

Boddie v. Connecticut, 401 U.S. 371 (1971) 10

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 12

Conley v. Gibson, 355 U.S. 41 (1957) 12

Cleveland Board of Education v. Loudermill, ____ U.S. ____, 53 U.S.L.W. 4306 (1985) 10

Eastway Construction Corp. v. City of New York, 762 F. 2d 243 (2nd Cir. 1985) 8

Goldberg v. Kelly, 397 U.S. 254 (1970) 10

Haring v. Prosise, 462 U.S. 306 (1983) 12

Harry F. Chaddick Realty Inc. v. Maisel, 762 F. 2d 534 (7th Cir. 1985) 8

Contents

Page

Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976) 11

Kaufman v. Eli Lilly & Co., 65 N.Y. 2d 449, 492 N.Y.S. 2d 584, 482 N.E. 2d 63 (Ct. App. 1985) 12

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) 12

Koch v. Consolidated Edison Company, 62 N.Y. 2d 548, 479 N.Y.S. 2d 163, 468 N.E. 2d 1 (Ct. App. 1984), cert. denied, 105 S. Ct. 117, 84 L. Ed. 2d 326 12

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 10

McDonald v. City of West Branch, ____ U.S. ____, 80 L. Ed. 302 (1984) 12

Migra v. Warren City School District Board of Education, 465 U.S. 75 (1984) 5, 12

Nelson v. Piedmont Aviation, Inc., 750 F. 2d 1234 (4th Cir. 1984) 8

Schwartz v. Public Administrator, 24 N.Y. 2d 65, 298 N.Y.S. 2d 955, 246 N.E. 2d 725 (Ct. App. 1969) 12

United States v. Diebold, Inc., 369 U.S. 654 (1962) 11

United States v. Westinghouse Co., 339 U.S. 261 (1950) 9

Contents

Page

Vitek v. Jones, 445 U.S. 480 (1980) 10

Statutes Cited:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1983 .....2, 7

42 U.S.C. § 4601 9

New York State General Municipal Law, Section 74-b (McKinney's Consolidated Laws of New York, West Publishing) 9

United States Constitution Cited:

Fifth Amendment 9

Rules Cited:

Federal Rules of Civil Procedure:

Rule 11 .....i, 2, 6, 8

Rule 12(b)(1) 2, 11

Rule 12(b)(6) 2, 11

Rule 56 .....3, 11

Federal Rule of Appellate Procedure 38 .....3, 7

Contents

Page

APPENDIX

Appendix A — Opinion of the Court of Appeals for the Second Circuit Dated March 12, 1986 ..... 1a

Appendix B — Decision of the United States District Court for the Eastern District Dated August 27, 1985 ..... 12a

Appendix C—Relevant Constitutional Provisions and Statutes 20a

No.

In The

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October Term, 1985

BARTEL DENTAL BOOK CO. INC. and MAPLETON HOUSE BOOKS, INC.,

Petitioners,

vs.

PETER J. SCHULTZ, DORMITORY AUTHORITY OF THE STATE OF NEW YORK and EDWARD A. PICHLER, SHERIFF OF THE CITY OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Bartel Dental Book Co. Inc. and Mapleton House Books, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 12, 1986.

OPINIONS BELOW

The decision of the Court of Appeals is reproduced in the appendix hereto at p. 1a. The unreported opinion of the District Court of the Eastern District of New York from which appeal was taken dated August 27, 1985 is also reproduced in the appendix hereto at p. 12a.

STATEMENT OF JURISDICTION

This petition for a writ of certiorari has been filed within 60 days of the entry of judgment of the United States Court of Appeals for the Second Circuit. Jurisdiction to seek the writ of certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Relevant constitutional provisions and statutes are quoted in the appendix annexed to this petition (20a).

STATEMENT OF THE CASE

A. THE PROCEEDINGS

This action was commenced on March 18, 1985 in the District Court for the Eastern District of New York. The jurisdiction of that court was premised under 42 U.S.C. § 1983. On May 3, 1985, prior to answering the complaint, respondents filed a motion pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure for an order dismissing the complaint in its entirety for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted. Respondents also requested the imposition of sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure.

At the oral argument of the motion on June 28, 1985, the District Court (Nickerson, J.) advised that it was treating the motion to dismiss as a motion for summary judgment pursuant to Rule 56.

Subsequently, on August 27, 1985, the District Court issued its opinion and order dismissing the complaint and imposed sanctions under Federal Rule of Civil Procedure 11, except for work fairly attributable to work done in defending all claims except the first claim which the court considered not to be frivolous.

On March 12, 1986, the Court of Appeals for the Second Circuit affirmed the decision below and imposed double costs and sanctions for a frivolous appeal under Federal Rule of Appellate Procedure 38.

B. THE FACTS

The petitioners are in the business of buying and selling professional books and journals and occupied buildings located in the Crown Heights section of Brooklyn, New York.

On August 9, 1983, the Dormitory Authority of the State of New York, a public benefit corporation, exercised its power of eminent domain and condemned the property.

On March 21, 1984, the condemnation claims filed by petitioners were settled. There remained open, however, the issue of compensation for the expense of the relocation of several millions of volumes of books and journals stored on the premises.

The parties agreed to negotiate the compensation for the moving expense at a later date, but, these negotiations broke down after the Authority's Deputy Executive Director Peter J. Schultz

refused to even offer the amount of his appraisal, something he did not do to others on the site.

The Authority then filed a motion for a "Writ of Assistance", an order directing the Sheriff of the City of New York to remove Mapleton. The application was opposed and a hearing was requested on the issue of relocation. Bartel, the other related entity occupying space in the same building was not served or mentioned.

No hearing was ever held and although Mapleton attempted to hold off the removal by a number of judicial applications, it was unable to obtain a hearing. Finally, in September 1984 the Sheriff of the City of New York removed all the books and placed them in storage.

The petitioners attempted to recover their books and were told that if they wanted their property returned they would first be required to execute general releases of liability to all parties and pay storage and moving costs. The storage company and moving company would not even allow petitioners to inspect their property advising that they were so instructed by the Dormitory Authority.

After the instant civil rights action was commenced, and before the return date of the motion to dismiss, the moving company and warehouse settled with petitioners and delivered the books to petitioners' new location.

The District Court was advised that petitioners recovered their property, had discontinued against the mover and warehouse company and that petitioners would be amending their complaint. Nevertheless, the District Court granted the respondents' motion holding that the claims, except for the equal protection claim, were raised or could have been raised in the state court proceedings and were now precluded by the doctrines of collateral estoppel

and *res judicata* under *Migra v. Warren City School District Board of Education,* 465 U.S. 75 (1984).

The District Court found that the equal protection claim had merit and considered it to be the only claim which arose above frivolity (19a).

Nevertheless, the lower court dismissed the equal protection claim based on a failure to show facts. This was a decision on a pre-answer motion. No discovery had taken place. Petitioners had alleged facts which were not contested at this stage, and if these facts were accepted as true, should have defeated a motion of dismissal.

The Second Circuit affirmed.

In discussing the equal protection claim, the Second Circuit held "[t]here was no evidence, however, that Mapleton was discriminated against because it was a member of a suspect class or exercised a protected right". The Second Circuit held that administrative action is presumed regular unless there is some burden on a protected class or on protected rights (8a).

The Second Circuit held that petitioners' claim that it was entitled to a due process hearing was frivolous.

Petitioners herein seek certiorari to review the error of both federal courts' failure to deem petitioners' factual allegations as true and to apply all reasonable inferences against the motion. Certiorari is also requested to review the Second Circuit's holding that petitioners were not entitled to a due process hearing and that sanctions were appropriate when part of their complaint rose above frivolity and the complaint resulted in a beneficial result to petitioners.

REASONS FOR GRANTING THE WRIT

I.

AWARDING RULE 11 SANCTIONS IS PUNITIVE AND IS IN CONFLICT WITH ITS PURPOSE.

The imposition of sanctions under Rule 11 is a powerful deterrent to frivolous litigation and abusive practices of attorneys. However, it was intended to correct lawyers' misconduct and not to change the "American Rule" governing allocations of the costs of litigation.

The existence of the Rule has a chilling effect on the ability of litigants to obtain counsel. Civil rights cases have often been unpopular matters. If the instant Second Circuit holding is allowed to stand, an unreasonable restraint will exist in that any lawyer will be reluctant in taking a difficult case unless that attorney can guarantee successful results.

No federal Court of Appeals had previously upheld Rule 11 sanctions in a pre-answer motion where one of the several federal claims asserted has been found by the trial court not to be frivolous. It is submitted that if part of a complaint is non-frivolous or meritorious, Rule 11 sanctions are inappropriate. Either a lawsuit is frivolous or it is not. There should be no uncharted gray area which presents total danger for the good faith litigator.

Furthermore, no decision has been rendered by any Circuit Court which awarded sanctions after there has been a beneficial result obtained by commencing the lawsuit.

The Second Circuit inexplicably failed to comment on how Rule 11 sanctions could be imposed by the District Court after

the petitioners obtained a major result which was not obtainable without this litigation.

The petitioners could not recover their property which was forceably removed and held unless they paid moving expenses and gave general releases to all parties. After the lawsuit was commenced, the petitioners settled and discontinued their action against two of the original party defendants and recovered their property. The trial court was informed of the settlement and that petitioners were going to amend their complaint with respect to the value of the inventories which were wrongfully withheld.

In affirming the dismissal of the complaint and the award of sanctions under Rule 11, the Court of Appeals for the Second Circuit awarded further sanctions for bringing a frivolous appeal under Rule 38. To impose this additional punishment, stiffles a litigant's ability to have a District Court's decision reviewed. It requires as a conclusion that a District Court can never err in dismissing a civil rights suit and awarding sanctions. The appeal was pursued to review what petitioners' counsel perceived as clear error, the granting of a summary judgment motion under Rule 56 because of an asserted failure to show facts supporting an equal protection claim when there was never an opportunity to establish facts.

The Circuit Courts have not been uniform in their holdings of when Rule 11 sanctions are to be applied and it is important for this Court to set specific guidelines for future litigants. The Second Circuit's decision in this matter, if allowed to stand, will effectively bar the use of the Civil Rights Act, 42 U.S.C. § 1983 to remedy the deprivation of statutory or constitutional rights.

There is also a conflict with the decisions of other federal Courts of Appeals on whether the Second Circuit's holding that ". . . subjective good faith no longer provides the safe harbor

it once did" *Eastway Construction Corp. v. City of New York,* 762 F.2d 243, 253 (2nd Cir. 1985) is valid.

The Fourth Circuit appears to apply a "good faith" rule and will not impose Rule 11 sanctions when there is good faith argument for the extension, modification or reversal of existing law. *Nelson v. Piedmont Aviation Inc* , 750 F.2d 1234, 1238 (4th Cir. 1984).

It is submitted that the Seventh Circuit would not impose sanctions since the complaint was filed in good faith and far from being frivolous, petitioners' first count presented some very difficult problems indeed. *See Harry F. Chaddick Realty Inc. v. Maisel,* 762 F.2d 534 (7th Cir. 1985).

Although petitioners do not suggest that their lawsuit compares in importance to the landmark decisions rendered by this Court in the civil rights area, they do wish to argue that many of the attorneys who brought those suits could very well have had Rule 11 sanctions imposed if the same punitive standards now being applied by the Second Circuit were applied.

II.

THE SECOND CIRCUIT'S HOLDING THAT PETITIONERS WERE NOT ENTITLED TO DUE PROCESS IS CONTRARY TO THE WELL ESTABLISHED LAW OF THIS COURT AND THE CONSTITUTION.

It is submitted that this petition should be granted and the issues presented herein decided in order to eradicate the confusion evident in the Second Circuit opinion in holding that petitioners were not entitled to due process rights of a full evidentiary hearing to determine the proper method of calculating relocation costs.

The Second Circuit, in the instant matter, held that the Fifth Amendment to the Constitution does not give rise to a "just compensation" right for the cost of relocating a business (7a). In support of this statement, the court relied on *United States v. Westinghouse Co.*, 339 U.S. 261 (1950). The reliance was misplaced because the *Westinghouse* decision is not controlling for a number of reasons. First, the District Court would be compelled to apply the law of the State of New York in determining what is proper just compensation in any condemnation case and in New York condemnation proceedings (unlike federal condemnation proceedings) consequential damages are always allowable. Secondly, even in federal condemnation proceedings, the *Westinghouse* decision would no longer apply because Congress enacted the Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601, *et seq.*, which mandates payment of relocation expenses.

The Second Circuit was further in error in holding that there was no New York State right to be paid relocation costs and that petitioners ". . . argument that it had a due process right to full evidentiary hearing to determine the proper method of calculating relocation costs is thus frivolous." (8a). It is evident now that this holding was absolute error because there is a New York statute which mandates payment of moving and relocation expenses. New York State General Municipal Law, Section 74-b (McKinney's Consolidated Laws of New York, West Publishing).

The Second Circuit effectively held that petitioners were not entitled to due process and by footnote stated:

> Even if Mapleton had a due process interest in obtaining the full measure of relocation costs available to it under New York administrative law, Mapleton's interest in that benefit must be balanced against the state's interest in efficient

> condemnation proceedings. Cf. Cleveland Board of Education v. Loudermill, 53 U.S.L.W. 4306, 4308-09 (U.S. Mar. 19, 1985). Therefore, the only process actually due to Mapleton was notice and the opportunity to be heard on the issue. Id. at 4309. The record contains ample proof that Mapleton had both. [8a].

This holding is directly in contravention of this Court's holding in the *Loudermill* decision which held that the root requirement of the Due Process Clause is that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest. In holding that petitioners are not entitled to due process the Second Circuit decided a federal question in a way which is in conflict with applicable decisions of this Court. *See Boddie v. Connecticut,* 401 U.S. 371 (1971) and *Bell v. Burson,* 402 U.S. 535 (1971).

When the court further held that "even if" Mapleton had a due process interest, the only process due was notice and the opportunity to be heard, its alternative holding was likewise in conflict with this Court's decisions holding that the fundamental requisite of due process affording the opportunity to be heard requires that the hearing must be held "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965), *cited in Goldberg v. Kelly,* 397 U.S. 254, 267 (1970). It is also in conflict with this Court's holdings in *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982) and *Vitek v. Jones,* 445 U.S. 480 (1980) which requires that there be a meaningful procedure to obtain the opportunity for a hearing on the merits.

III.

THE DISMISSAL OF AN EQUAL PROTECTION CLAIM BY A PRE-ANSWER MOTION ON THE BASIS THAT THERE WAS A FAILURE TO ESTABLISH FACTS WAS A CLEAR DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The Second Circuit also affirmed the lower court's dismissal of an equal protection claim on the basis that there was no evidence that Mapleton was discriminated against because it was a member of a suspect class or exercised a protected right. It held, "[b]ecause there was no genuine issue as to any material fact, NYDA was entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Therefore, the Court's grant of summary judgment was proper." (8a). This was a clear departure from the accepted and usual course of judicial proceedings which requires an exercise of this Court's power of supervision.

This matter was on appeal to the Second Circuit after a motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(1) and (6) was converted by the District Court judge, at oral argument, to a motion for summary judgment pursuant to Fed. R. Civ. P. 56.

The petitioners did not conduct any discovery at this early stage of the litigation and were entitled to have the factual allegations of the complaint accepted as true. *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976). Any ambiguity in the pleading was to be resolved against the motion contrary to the Circuit Court's holding that "administrative action is presumed regular", the court was required to draw all reasonable inferences against the motion. *United States v. Diebold Inc.*, 369 U.S. 654 (1962). For the Second Circuit to hold that there was no genuine issue as to any material fact was an abuse of procedural due process. Dismissal should not have been granted unless it

appeared beyond doubt that petitioners could not prove a set of facts in support of their claim which would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The Second Circuit also departed from accepted and usual course of judicial proceedings by holding this Section 1983 action barred under *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984). However, this Court has held that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted, did not have a "full and fair opportunity" to litigate that issue in the earlier case. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 482 (1982); *Allen v. McCurry*, 449 U.S. 90, 95 (1980); *Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-329 (1971). Under *Migra*, the federal courts were required to apply the same preclusive effect that the New York state courts would apply. New York would not have given a preclusive effect to the prior state litigation in this matter. *Kaufman v. Eli Lilly & Co.*, 65 N.Y. 2d 449, 492 N.Y.S. 2d 584, 482 N.E. 2d 63 (Ct. App. 1985); *Koch v. Consolidated Edison Company*, 62 N.Y. 2d 548, 479 N.Y.S. 2d 163, 468 N.E. 2d 1 (Ct. App. 1984), *cert. denied*, 105 S. Ct. 1177, 84 L. Ed. 2d 326; *Schwartz v. Public Administrator*, 24 N.Y. 2d 65, 298 N.Y.S. 2d 955, 246 N.E. 2d 725 (Ct. App. 1969). This Court has uniformly held that a prior state court judgment would not preclude the federal courts from acting where the state courts were unable or unwilling to protect federal rights. *Haring v. Prosise*, 462 U.S. 306 (1983); *Allen v. McCurry*, 449 U.S. 90 (1980). *See also, McDonald v. City of West Branch*, ____ U.S. ____, 80 L. Ed. 2d 302 (1984). Indeed, this is the very purpose for which Congress enacted the Civil Rights Act.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

MICHAEL RIKON
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Attorneys for Petitioners

APPENDIX A—OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MARCH 12, 1986

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 579—August Term, 1985

(Argued December 18, 1985 Decided March 12, 1986)

Docket No. 85-7754

BARTEL DENTAL BOOKS CO., INC. and MAPLETON HOUSE BOOKS, INC.,

Plaintiffs-Appellants,

—v.—

PETER J. SCHULTZ, DORMITORY AUTHORITY OF THE STATE OF NEW YORK, VALIANT RIGGING & TRANSPORTATION, INC., EDWARD A. PICHLER, SHERIFF OF THE CITY OF NEW YORK and NEW YORK PIGGYBACK WAREHOUSE, INC.,

Defendants,

PETER J. SCHULTZ, DORMITORY AUTHORITY OF THE STATE OF NEW YORK and EDWARD A. PICHLER, SHERIFF OF THE CITY OF NEW YORK,

Defendants-Appellees.

Before:

TIMBERS, MESKILL and PRATT,
Circuit Judges.

Appeal from grant of summary judgment by the United States District Court for the Eastern District of New York, Nickerson, *J.*, dismissing plaintiff's 42 U.S.C. § 1983 (1982) action and ordering plaintiffs to pay defendants' attorneys' fees in defending against all except one of plaintiffs' claims.

Affirmed.

MICHAEL RIKON, New York City (Rudick and Rikon, New York City, of counsel), *for Appellants.*

DAVID E. NACHMAN, New York City (Martin Flumenbaum, Paul, Weiss, Rifkind, Wharton & Garrison, New York City, of counsel), *for Appellees Peter J. Schultz and Dormitory Authority of the State of New York.*

Frederick A.O. Schwarz, Jr., Corporation Counsel of the City of New York, Fay Leoussis, Barry P. Schwartz, Office of the Corporation Counsel of the City of New York, New York City, *for Municipal Appellee Pichler.*

MESKILL, *Circuit Judge*:

This is an appeal from the grant of summary judgment by the United States District Court for the Eastern District of New York, Nickerson, *J.*, after finding that (1) the claims of appellant Bartel Dental Books Co. (Bartel) under 42 U.S.C. § 1983 (1982) were frivolous because Bartel had previously released all of its claims against defendants, and (2) the claims of appellant Mapleton House Books, Inc. (Mapleton) were barred by the doctrines of issue and claim preclusion. The district court also ordered plaintiffs to reimburse defendants New York Dormitory Authority (NYDA) and Peter J. Schultz for the costs and attorneys' fees they incurred in defending against all but one of plaintiffs' claims.

We affirm the judgment of the district court and order that sanctions for a frivolous appeal be imposed on appellants and their attorney, Michael Rikon.

BACKGROUND

Bartel and Mapleton were family owned businesses operating out of the same warehouse. Bartel owned the warehouse and Mapleton leased it from Bartel. When NYDA condemned the property, Bartel and Mapleton filed claims for their respective losses. Later Bartel released NYDA from all claims and Mapleton gave NYDA a partial release, expressly reserving any claim it might have for relocation costs.

Although NYDA was not bound by either federal or state law to pay a business for the cost of moving its operations, it regularly followed the administrative practice of the City of New York and made such payments.

Mapleton and NYDA failed to reach an agreement with regard to relocation expenses.

NYDA moved under section 405 of the New York Eminent Domain Procedure Law, N.Y.E.D.P.L. § 405 (McKinney 1979), for an order directing Mapleton to vacate the premises. In its moving papers, NYDA alerted the Supreme Court that Mapleton might attack NYDA's method of calculating relocation costs. Mapleton defaulted instead and the order to vacate was granted. Mapleton then confirmed NYDA's prognostication. In Mapleton's appeal of the order to vacate, it claimed that NYDA's method of calculating relocation costs violated its rights to due process. The Appellate Division ultimately dismissed that appeal for lack of prosecution.

Mapleton's due process claim appeared a second time in a proceeding under Article 78 of the New York Civil Practice Law, N.Y. Civ. Prac. Law § 7801 *et seq.* (McKinney 1981). There Mapleton requested a judicial determination of the proper method for calculating relocation costs and a stay of the order to vacate. The application for a stay was denied. Mapleton then abandoned the Article 78 proceeding.

Mapleton and Bartel next brought a section 1983 action in federal court alleging that the failure to grant them a plenary hearing on the amount and manner of calculating relocation expenses denied them their rights to due process and that the failure to treat them in the same manner as the other claimants denied them equal protection of the law. Defendants moved to dismiss the action. The district court treated the motion as one for summary judgment after giving the parties notice at oral argument that it intended to do so. Mapleton submitted a memo-

randum in opposition to the motion to dismiss, again asserting that it had a constitutional right to a hearing.

The district court found that Bartel had released all claims against NYDA when it signed a release. The court therefore concluded that Bartel's section 1983 claims were frivolous. As to Mapleton, the court concluded that because all of its constitutional claims were actually raised or could have been raised in the state court proceedings, they were barred under *Migra* v. *Warren City School District Board of Education*, 4675 (1984). Thus, even if those claims were not barred by *res judicata*, they failed on the merits because Mapleton had no right to relocation expenses under either federal or state law and, therefore, there was "no right to which process [was] due." J. App. at 326. Furthermore, the court found that Mapleton had failed to make a showing that there was a genuine equal protection issue. It imposed Rule 11 sanctions against Mapleton, Bartel and their attorneys for bringing a frivolous suit.

Mapleton and Bartel claim on this appeal that the district court erred in all aspects of its decision. We disagree. Mapleton and Bartel also claim that the district judge should have recused himself because one of his law clerks had applied to become an associate in the law offices of defendant Schultz's counsel. This claim is frivolous.

DISCUSSION

1. *Bartel's Release*

The district court properly found Bartel's claims to be frivolous. Contract principles apply to the interpretation

of releases. *Bank of America* v. *Gillaizeau*, 766 F.2d 709, 715 (2d Cir. 1985). Bartel argues before this Court that there is parol evidence to establish that all parties to the release implicitly agreed that Bartel's claims for relocation expenses were reserved. There was no explicit reservation in Bartel's release; moreover, both the underlying settlement agreement and the release had valid integration clauses. Bartel thus seeks to contradict the plain language of the settlement agreement. That attempt clearly runs afoul of the parol evidence rule. *Katz* v. *American Technical Industries*, 466 N.Y.S.2d 378, 380 (App. Div. 1983).

2. *Claim Preclusion Under* Migra

In *Migra*, the Supreme Court held that federal district courts hearing section 1983 actions should apply the law of the forum state when deciding matters of claim preclusion. 465 U.S. at 85. The district court in this case properly found that all of the claims raised in Mapleton's section 1983 action were or could have been litigated both in the course of Mapleton's efforts to resist eviction and in the Article 78 action. It also properly found that New York courts would bar Mapleton from relitigating its constitutional claims. *See O'Brien* v. *City of Syracuse*, 445 N.Y.S.2d 687, 688 (Ct. App. 1981) ("[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction . . . are barred, even if based upon different theories or if seeking a different remedy.").

Mapleton argues that *Migra* does not apply when a hearing has not actually been granted by the state courts. This argument is without merit for two reasons. First, *Migra* emphasized that federal courts should apply the *same* preclusive doctrines that a state court would apply. 465 U.S. at 81. New York courts look to whether a claim

has been "brought to a final conclusion," not to whether a full evidentiary hearing has been held on the claim. *See O'Brien*, 445 N.Y.S.2d at 688. Second, the *Migra* Court reasoned that the legislative policy embodied in 28 U.S.C. § 1738, which grants full faith and credit to state court judgments, was more important than providing a separate forum for state and federal claims. 465 U.S. at 84. In light of this reasoning, we apply the doctrine of *res judicata* to the facts of this case without regard to whether a hearing was actually granted in state court.[1] Even if Mapleton's constitutional claims were not barred by *res judicata*, they were properly dismissed because they fail on the merits.

3. *Due Process*

The Fifth Amendment to the Constitution does not give rise to a "just compensation" right for the cost of relocating a business. *United States* v. *Westinghouse Co.*, 339 U.S. 261, 264 (1950). Moreover, Mapleton cites no federal statute that would require NYDA to pay a condemnee's relocation expenses. The New York Constitution also does not establish a right to be paid relocation

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1 Mapleton disingenuously claims that when it raised in state court the issues sought to be litigated here it was in a defensive posture. Mapleton was not in a defensive posture in the Article 78 proceeding. Moreover, we have already held that a "defensive posture" argument does not vitiate *Migra*. *Genova* v. *Town of Southampton*, 776 F.2d 1560, 1561 (2d Cir. 1985) (per curiam).

Mapleton also urges that it did not have a "full and fair opportunity" to litigate the question it raises here. *See Kaufman* v. *Eli Lilly and Co.*, 492 N.Y.S.2d 584, 588-89 (Ct. App. 1985); *Schwartz* v. *Public Administrator*, 298 N.Y.S.2d 955, 958-60 (Ct. App. 1969). Mapleton questioned the method for determining relocation expenses when it opposed the motion to dismiss its direct appeal of the order to vacate. It could have pressed the issue in the Article 78 action, but chose instead to concentrate on getting a stay of the order to vacate. Mapleton had a "full and fair opportunity" to litigate the claims brought here.

costs unless a statute expressly authorizes such payment. *Dormitory Authority* v. *Security Mutual Insurance*, 405 N.Y.S.2d 253 (App. Div. 1983); *City of Buffalo* v. *Mollenberg-Betz Machine Co.*, 279 N.Y.S.2d 842, 849-50 (Sup. Ct. 1966). Mapleton concedes as much. Its argument that it had a due process right to a full evidentiary hearing to determine the proper method of calculating relocation costs is thus frivolous.[2]

4. *Equal Protection*

The only original claim in this action was that Schultz violated Mapleton's equal protection rights under the Fourteenth Amendment of the Constitution by offering other condemnees better relocation settlements than were tendered to Mapleton. There was no evidence, however, that Mapleton was discriminated against because it was a member of a suspect class or exercised a protected right. NYDA and Schultz correctly argue that administrative action is presumed regular unless there is some burden on a protected class or on protected rights. *Cf. Bishop* v. *Wood*, 426 U.S. 341, 350 (1976). Thus, no hearing in federal court is required to determine that the action was regular. Mapleton's argument on this point is frivolous.

Because there was no genuine issue as to any material fact, NYDA was entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Therefore, the court's grant of summary judgment was proper.

---

2 Even if Mapleton had a due process interest in obtaining the full measure of relocation costs available to it under New York administrative law, Mapleton's interest in that benefit must be balanced against the state's interest in efficient condemnation proceedings. *Cf. Cleveland Board of Education* v. *Loudermill*, 53 U.S.L.W. 4306, 4308-09 (U.S. Mar. 19, 1985). Therefore, the only process actually due to Mapleton was notice and the opportunity to be heard on the issue. *Id.* at 4309. The record contains ample proof that Mapleton had both.

5. *Rule 11 Sanctions*

Mapleton's equal protection claim against Schultz was the only claim raised for the first time in its federal action. That claim was not supported by any legally relevant facts. Mapleton's other claims had already been rejected by the New York courts and were clearly without merit. Furthermore, a competent attorney could not form a reasonable belief that any of these claims were "warranted by existing law or a good faith argument for extension, modification, or reversal of existing law." Fed. R. Civ. P. 11. *See also Eastway Construction Corp.* v. *City of New York*, 762 F.2d 243, 253-54 (2d Cir. 1985).

The district court clearly did not abuse its discretion when it ordered Mapleton to pay defendants' costs and attorneys' fees. The district court probably would have erred if it had *not* awarded attorneys' fees to NYDA and to Schultz under Rule 11 of the Federal Rules of Civil Procedure. *See Eastway*, 762 F.2d at 253-54. *See also Harbulak* v. *County of Suffolk*, 654 F.2d 194, 198 (2d Cir. 1981) (trial court erred when it refused to award attorneys' fees to prevailing defendant where plaintiff's action under section 1983 was "unreasonable and groundless, if not frivolous").

6. *Recusal*

Mapleton argues that Judge Nickerson should have recused himself when he learned that the law firm representing defendant Schultz was considering one of his law clerks, who was not working on the case, for employment as an associate. Mapleton concedes that disqualification has not been required where the clerk is not working on the case. *Reddy* v. *Jones*, 419 F.Supp. 1391 (W.D.N.C.

1976). Mapleton argues, however, that another clerk who was working on the case "had to be" influenced by the knowledge that a co-worker was joining Schultz's law firm. It also argues that a hearing should have been held on the issue of recusal.

The conclusion that a law clerk "had to be" influenced by the actions of a co-worker is compelled by neither logic nor the record before us. Furthermore, the facts on the record do not justify further inquiry. This claim is also frivolous.

7. *Sanctions for Frivolous Appeal*

This court has discretion to award Schultz and NYDA damages and double costs if it determines that this appeal is frivolous. Fed. R. App. P. 38. They may be awarded "as a matter of justice to the appellee[s] and as a penalty against the appellant." Fed. R. App. P. 38 advisory committee note. Bartel and Mapleton have raised only frivolous issues on this appeal. The sheer number of claims of error makes the appeal no less frivolous. Neither does the naked assertion of good faith make the claims less unreasonable. The imposition of Rule 38 sanctions on Bartel and Mapleton is justified in this case.

Attorneys can be held jointly and severally liable with their clients under Rule 38 for bringing frivolous appeals. *United States* v. *Potamkin Cadillac Corp.*, 689 F.2d 379, 381-82 (2d Cir. 1982); *Muigai* v. *INS*, 682 F.2d 334, 337 (2d Cir. 1982); *see also* 28 U.S.C. § 1927 (1982) ("[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such con-

duct"); *cf. In re Cosmopolitan Aviation Corp.*, 763 F.2d 507, 517 (2d Cir.), *cert. denied*, 54 U.S.L.W. 3407 (U.S. Dec. 17, 1985) (sanctions for frivolous appeal also justified under inherent power of court).

Bartel's and Mapleton's counsel in this case should have been on notice that our patience with frivolous appeals is at an end. *See, e.g., Beary* v. *West Publishing Co.*, 763 F.2d 66, 69 (2d Cir.), *cert. denied*, 54 U.S.L.W. 3252 (U.S. Oct. 15, 1985); *Potamkin Cadillac*, 689 F.2d at 381-82; *Muigai*, 682 F.2d at 337. We refer him to our "stern warning that the United States Courts are not powerless to protect the public, including litigants who appear before the Courts, from the depredations of those . . . who hold themselves out as attorneys but who abuse the process of the Courts." *In re Hartford Textile Corp.*, 659 F.2d 299, 305 (2d Cir. 1981).

In this case, counsel brought the same claims on appeal that the district court had previously found to be frivolous or baseless. The district court properly determined that the original pleading was not well grounded in fact and that it was not warranted either by existing law or by a good faith argument for reversing existing law. *See* Fed. R. Civ. P. 11. In his appellate brief and oral argument, counsel attempted to obfuscate the fact that his clients had no federal claim. Moreover, he fails even to offer a good faith argument for reversing the precedents that are so hostile to his clients' claims.

Affirmed with double costs against appellants Bartel and Mapleton and $1,000 attorneys' fees as damages against appellants' attorney Michael Rikon, all in favor of appellees Schultz and NYDA.

APPENDIX B—DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT DATED AUGUST 27, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

85 C 993

BARTEL DENTAL BOOK CO. INC. and MAPLETON HOUSE BOOKS, INC.,

Plaintiffs,

-against-

PETER J. SCHULTZ, DORMITORY AUTHORITY OF THE STATE OF NEW YORK, VALIANT RIGGING & TRANSPORTATION, INC., EDWARD A. PICHLER, SHERIFF OF THE CITY OF NEW YORK and NEW YORK PIGGYBACK WAREHOUSE, INC.

Defendants.

MEMORANDUM AND ORDER

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(Michael Rikon, Esq., of counsel)
New York, New York
for plaintiffs

Appendix B

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(Martin Flumenbaum and David E. Nachman, Esqs., of counsel)
New York, New York
for defendants Peter J. Schultz and Dormitory Authority of the State of New York

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Corporation Counsel of the City of New York
(Kenneth P. Fee, Assistant Corporation Counsel, of counsel)
New York, New York
for defendant Edward A. Pichler

NICKERSON, District Judge

Plaintiffs brought this action under 42 U.S.C. § 1983, and also alleged state law claims. The case has been discontinued as to the private defendants and only Schultz, the Dormitory Authority of the State of New York (the Authority) and Pichler remain as defendants. They move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). On notice to both parties at oral argument, the court treats it as a motion for summary judgment. *See* Federal Rule of Civil Procedure 12(b)(6). Defendants Schultz and Dormitory Authority also move for sanctions under Federal Rule of Civil Procedure 11.

The following facts are undisputed. Plaintiffs Bartel Dental Book Co. Inc. (Bartel) and Mapleton House Books, Inc. (Mapleton) are in the business of buying and selling used books and periodicals. Bartel held title to real property at 112 Crown Street, Brooklyn (112 Crown), of which Mapleton was the lessee.

The Authority is a New York State public benefit corporation, and Schultz is its Deputy Executive Director. The Authority and

Appendix B

Schultz participated in the condemnation proceedings whereby the Authority acquired property (which included 112 Crown) to build new facilities for Medgar Evers College, a part of the City University of New York.

On August 9, 1983 the Supreme Court of the State of New York granted title to 112 Crown. On March 21, 1984 the plaintiffs and the Authority entered into a settlement agreement under which the Authority was to pay Bartel a certain sum for its fee claim, and Bartel, "satisfied, discharged, released and settled" all claims "made or which could have been made" in the condemnation proceeding. The Authority entered into a similar arrangement with Mapleton for its fixture claim, but Mapleton specifically reserved "any claim for relocation costs" which Mapleton "may have." The agreement further provided that the plaintiffs:

> warrant and represent (a) that Mapleton is the only entity or person in possession of [the premises in question]; and (b) that Mapleton is the only person or entity who has any right, title or interest in or to any and all of the fixtures located in or about [the premises].

Mapleton continued, however, to occupy the premises, and in April of 1984 the Authority moved in the Supreme Court of the State of New York for eviction pursuant to the Eminent Domain Procedure Law Section 405. On May 7, 1984, on consideration of the papers submitted by the Authority and Mapleton, Judge Leone granted the Authority's motion and ordered Mapleton to vacate the premises by May 10, 1984.

Mapleton then brought on a series of motions and appealed. The Appellate Division at first granted a stay, but on July 27,

1984 vacated the stay. On September 12, 1984 the Appellate Division denied an order to restrain eviction. When the Sheriff began to remove Mapleton's books from the premises Mapleton brought an Article 78 proceeding and applied for a restraining order against removal. The Kings County Supreme Court denied the order, and on September 21, 1984 denied a preliminary injunction. On March 12, 1985 the Appellate Division dismissed the appeal from the original eviction order for failure to perfect the appeal.

The complaint in the present case includes twelve claims, three federal claims pursuant to 42 U.S.C. § 1983 and nine pendent state claims. The first claim is against Schultz for refusing "to apply or give the same relocation benefits to plaintiffs as it did to other claimants." The second is against Schultz and the Authority and appears basically to allege that plaintiffs were denied due process by failure to receive a "plenary" or "evidentiary" hearing on their relocation costs prior to eviction. The third federal claim is against Schultz and the Authority alleging that plaintiffs failed to receive "just compensation' for the relocation of their property.

I

Bartel has no claim against the Authority and its agents. On March 21, 1984 Bartel executed a release and an agreement settling all its claims against the Authority. Bartel, unlike Mapleton, did not reserve a claim for relocation costs. The agreement and release make it clear that Bartel's claims are frivolous.

II

Mapleton's federal claims are barred by the doctrines of issue

and claim preclusion. Mapleton's second claim, asserting a due process challenge to the failure of the state courts to grant a pre-eviction evidentiary hearing on relocation expenses, was raised in the state courts.

In moving to reargue Judge Leone's decision, Mapleton argued that the court should have set the matter down for a "plenary hearing" on the relocation issue. An affidavit of Sidney Baumgarten, the lawyer for Mapleton at that time, shows that Mapleton also argued before Judge Leone on the original motion that he should hold a plenary hearing on the issue.

Mapleton continued to argue on appeal and in its motions for stays that a plenary hearing should have been held, and that it had a right to relocation expenses under "the Federal and State Constitutions." In seeking a preliminary injunction on September 21, 1984, while its appeal of Judge Leone's decision was still pending, Mapleton again contended that it was entitled to relocation costs and a plenary hearing on the manner in which the books should be moved.

Mapleton's claims were raised, or could have been raised, in the state court proceedings and are now precluded by the doctrines of collateral estoppel and *res judicata*. *See Migra v. Warren City School District Board of Education*, 104 S. Ct. 892 (1984); *Wright v. National Bank of Stamford*, 600 F. Supp. 1289, 1299-1300 (N.D.N.Y. 1985). The state court judgments are binding in a later section 1983 claim, *Allen v. McCurry*, 449 U.S. 90 (1980), and even if a constitutional claim has not actually been litigated. *See Migra, supra*, 104 S. Ct. at 897-98 & n.6 (in effect reversing the rule of *Lombard v. Board of Education*, 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975)). A state court decision denying relief is no less preclusive because no opinion has been

written. *See Winters v. Lavine*, 574 F.2d 46, 60-61 (2d Cir. 1978).

Since Mapleton would be precluded from again raising its claims in the New York courts, Mapleton is also barred from relitigating those claims here. Its three federal claims arise out of the same transaction, and were or could have been presented to the state courts. Mapleton was not denied a full and fair opportunity to litigate those clains, including the claim that a pre-eviction hearing should have been held. *See generally Taylor v. New York City Transit Authority*, 433 F.2d 665 (2d Cir. 1970); *Samuell v. The New York Racing Association, Inc.*, 600 F. Supp. 819 (E.D.N.Y. 1985); *Heimbach v. Chu*, 744 F.2d 11, 13-14 (2d Cir. 1984).

Schultz concedes that Mapleton's first federal claim, asserting that he refused to accord relocation benefits which he granted others, was not actually litigated in the state proceedings. Nor was he a named party in those proceedings. New York has abandoned the requirement of mutuality, but it does require that the party against whom the collateral estoppel doctrine is invoked have had a "full and fair opportunity" to litigate the issue. *See Winters, supra*, 574 F.2d at 58 n.14.

Although plaintiff does not explicitly state in what capacity Schultz is sued, he is clearly joined in his official capacity as the Deputy Executive Director of the Authority. For the purposes of this action Schultz is in privity with the Authority, which can only act through its employees and agents, and shares an identity of interest with the Authority. Mapleton's first claim against Schultz is thus precluded by the doctrine of *res judicata*. *Cf. Andrasko v. Calkins*, 47 Misc.2d 816, 263 N.Y.S.2d 256 (1965); *Rooney v. Tutano Contracting Corp.*, 43 Misc.2d 358, 251 N.Y.S.2d 392 (1964).

Appendix B

III

Even were the federal claims not barred by the doctrines of collateral estoppel and *res judicata*, they do not state valid claims under § 1983. There is no federal constitutional right to relocation costs. *See, e.g., United States v. Westinghouse Electric & Mnf'g Co.*, 339 U.S. 261 (1950). There is also no state constitutional right to such costs, and plaintiffs do not assert a statutory right. Thus there is no right for which process is due. *City of Buffalo v. Mollenberg-Betz Machine Co.*, 53 Misc.2d 849, 279 N.Y.S.2d 842 (1966).

Nor has Mapleton shown facts to support an equal protection claim. In substance Mapleton contends that Schultz should have offered in moving costs $947,710, one of the estimates obtained by the Authority, or a higher amount in accordance with plaintiffs' estimates. Instead he offered a considerably lower sum based on other estimates. However, Mapleton makes no factual showing that Schultz adopted different criteria in determining the amount to be offered to Mapleton from the criteria used to establish offers to other claimants.

IV

Schultz and the Authority move for costs and attorney's fees under Federal Rule of Civil Procedure 11. That rule states that the signature of an attorney or party constitutes a certificate by him that to the best of his knowledge "after reasonable inquiry" the pleading is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . . ." The standard is intended to be more exacting than the previous good-faith formula.

Appendix B

There is no basis in law or fact for claims by Bartel which released the Authority of liability. Indeed, Bartel's current attorney witnessed that agreement. The only one of Mapleton's federal claims which the court considers to rise above frivolity is the first claim. The court will therefore award fees for work fairly attributable to work done in defending again all claims except Mapleton's first claim.

Plaintiffs' attorney participated in parts of the state court proceedings and was familiar with the course of the litigation. Plaintiffs and their attorney shall share equally the burden of paying the attorneys' fees incurred in defending this suit and are held jointly and severally liable for that amount. *See Raffe v. Citibank*, No. 84-305 (E.D.N.Y. Aug. 1, 1984).

V

Defendants' motions are granted and the complaint is dismissed, including the pendent state claims. *See Dunton v. County of Suffolk*, 729 F.2d 903, 910-11 (2d Cir. 1984). Defendants Schultz and the Authority shall submit affidavits of hours spent, fees sought and costs. So ordered.

Dated: Brooklyn, New York
August 27, 1985

s/ Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.

APPENDIX C—RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The provision of the United States Constitution involved is Section 1 of the Fourteenth Amendment which provides in relevant part that

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

42 United States Code, Section 1983 provides

> "§ 1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress".

Section 74-b of the General Municipal Law (West) provides

> "§ 74-b. Payment of moving and relocation expenses of residential and commercial owners and tenants of appropriated property.
>
> 1. The chief fiscal officer of every municipal

corporation shall establish and may amend rules and regulations authorizing the payment of reasonable and necessary moving expenses or occupants of property acquired by condemnation or agreement, such payments not to exceed one thousand dollars in the case of an owner or tenant of residential property and twenty-five thousand dollars in the case of an owner or tenant of commercial property. Such rules and regulations may further define the terms used in this section. Application for such payment shall be made to the chief fiscal officer of such municipal corporation upon forms prescribed by him and shall be accompanied by such information and evidence as he may require. Upon approval of such application, the chief fiscal officer of such municipal corporation shall deliver a copy thereof to the treasurer of the municipal corporation or other officer of such municipal corporation exercising corresponding functions together with a certificate stating the amount due thereunder, and the amount so fixed shall be paid out of the municipal corporation treasury after audit by the comptroller of the municipal corporation or other officer of the municipal corporation exercising corresponding functions from moneys appropriated for the acquisition of such property. As used in this section 'commercial property' shall include property owned by an individual, family, business concern (including the operation of a farm) and a non-profit organization.

The provisions of this subdivision shall not

apply to a city having a population of one million or more.

2. In addition to the authorization of subdivision one of this section, the governing body of any municipal corporation may adopt and amend rules and regulations authorizing the payment of relocation assistance allowances, related and other necessary expenses as described in the uniform relocation assistance act to owners or occupants of property or any interest therein acquired or to be acquired by such municipal corporation by condemnation, agreement or otherwise and for which federal funds shall be used toward the cost of such acquisition. Such rules and regulations may further define the terms used in this subdivision. In acquiring real property for which federal funds shall be used, the municipal corporation is hereby authorized to do such other and further acts not hereby specifically provided as may be necessary to comply with such uniform relocation assistance act. Application for such payment shall be made to the officer of such municipal corporation designated by the governing body, upon forms prescribed by him and shall be accompanied by such information and assistance as may be required to substantiate entitlement thereto. Payment shall be made as provided in such rules and regulations from moneys appropriated for the acquisition of such real property or interest therein.

Appendix C

3. As used in this section, the following terms shall have the following meanings:

(a) 'Municipal corporation'. A county, city, town, village, school district, fire district, district corporation and public authority.

(b) 'Uniform relocation assistance act'. The uniform relocation assistance and real property acquisition policies act of nineteen hundred seventy, being public law 91-646, as enacted by the ninety-first Congress of the United States and any federal laws amendatory or supplemental thereto.

(c) 'Governing body'. In a city, the legislative body as defined in subdivision seven of section two of the municipal home rule law, unless another provision of law or the city charter vests another officer or agency thereof with the power to fix and promulgate, with the approval of the mayor, schedules of relocation payments in which case, governing body shall mean such other officer or agency''.

No. 85-1874

Supreme Court, U.S.
FILED
JUN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

BARTEL DENTAL BOOK CO. INC. and MAPLETON HOUSE BOOKS, INC.,

Petitioners,

v.

PETER J. SCHULTZ, DORMITORY AUTHORITY OF THE STATE OF NEW YORK and EDWARD A. PICHLER, SHERIFF OF THE CITY OF NEW YORK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS SCHULTZ AND DORMITORY AUTHORITY IN OPPOSITION TO PETITION FOR CERTIORARI

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Of Counsel

Questions Presented

This case presents no issue worthy of certiorari. It raises no conflict among the circuits or any unsettled questions of law. Rather, this petition is yet another attempt to relitigate issues that were rejected by the New York State courts on five occasions and then rejected in the federal courts below. Every court has rejected petitioners' claims for the simple reason that they do not have a shred of legal or factual support.

Petitioners cannot possibly seek certiorari in good faith. For as *both* the district court and the court of appeals below determined:

—All of the claims brought by petitioner Bartel are flatly barred by a prior settlement agreement and release;

—Petitioner Mapleton's federal claims were actually raised, or could have been raised, during the extensive proceedings in the courts of New York State that preceded the filing of this so-called civil rights action. Applying elementary principles of *res judicata,* therefore, petitioners cannot relitigate under the guise of 42 U.S.C. § 1983 claims that had been rejected repeatedly by the state courts;

—As a matter of law, petitioners clearly have no substantive right to relocation benefits and thus there is no colorable basis to the claim that such a right had been denied in violation of federal due process and equal protection guarantees.

These various grounds led the district court to grant summary judgment to respondents. They also compelled the court to conclude that the bulk of the complaint was frivolous, and that respondents were entitled to an award of partial attorneys' fees under Rule 11, Fed. R. Civ. P.

The Second Circuit, in a unanimous opinion, affirmed each of the district court's findings. Indeed, it identified even further reasons why the complaint was not brought in good faith. It found that the appeal was frivolous as well, and awarded nominal sanctions under Rule 38, Fed. R. App. P.

Under these circumstances, the petition raises the following questions:

1. Should this Court grant certiorari to review any of Bartel's claims where both the district court and the Second Circuit, applying traditional principles of state law, determined that all of those claims were barred by Bartel's settlement agreement and release?

2. Should this Court grant certiorari where the Second Circuit applied traditional principles of *res judicata* approved by this Court to reject all of petitioners' federal claims, and where there are no conflicts among the circuits or novel questions of law?

3. Should this Court grant certiorari where both the district court and the Second Circuit determined that petitioners had no substantive right to relocation expenses to which federal constitutional protections could attach?

4. Should this Court grant certiorari where, after presenting evidence and being given the opportunity to present even further evidence, petitioners could raise no colorable claim of unequal protection so as to survive summary judgment?

5. Should this Court grant certiorari where discretionary Rule 11 sanctions were imposed solely as to those claims found to be frivolous, and where there is no conflict among the circuits?

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Table of Authorities	IV
Statement of the Case	2
A. The Facts	2
B. The State Court Proceedings	4
C. The Federal Complaint	6
D. The Proceedings Below	7
REASONS FOR DENYING CERTIORARI	10
I—The determination that all of Bartel's claims are barred by settlement and release presents no issue worthy of certiorari	10
II—In affirming summary judgment, the Second Circuit applied the standard for claim preclusion adopted by this Court	11
III—Both courts below correctly determined that petitioners had no right to relocation expenses under federal or state law	12
IV—In granting summary judgment on petitioners' equal protection claim, the court below followed the accepted and usual course of judicial proceedings	13
V—Certiorari is inappropriate to review the district court's sound exercise of discretion under Rule 11	15
Conclusion	17

TABLE OF AUTHORITIES

PAGE

Cases:

Allen v. McCurry, 449 U.S. 90 (1980) 11

Bell v. Sellevold, 713 F.2d 1396 (8th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984) 15

Cahill v. Cedar County, Iowa, 367 F. Supp. 39 (D. Iowa 1973), *aff'd*, 419 U.S. 806 (1974) 15

Harry F. Chaddick Realty Inc. v. Maisel, 762 F.2d 534 (7th Cir. 1985) 16, 17

Migra v. Warren City School District Board of Education, 465 U.S. 75 (1984) 11

Mitchell v. United States, 267 U.S. 341 (1925) 12

Nelson v. Piedmont Aviation, Inc., 750 F.2d 1234 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 2358 (1985) 16, 17

United States v. Westinghouse Electric & Mnf'g Co., 339 U.S. 261 (1950) 12

Statutes and Rules:

42 U.S.C. § 1983 11

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601 *et seq.* 12

§ 74-b, New York State General Municipal Law (McKinney's Consolidated Laws of New York, West Publishing) 13

Rule 11, Fed. R. Civ. P. 15, 16

Rule 12(b)(6), Fed. R. Civ. P. 14

Rule 56, Fed. R. Civ. P. 14

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PETER J. SCHULTZ, DORMITORY AUTHORITY OF THE STATE OF NEW YORK and EDWARD A. PICHLER, SHERIFF OF THE CITY OF NEW YORK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS SCHULTZ AND DORMITORY AUTHORITY IN OPPOSITION TO PETITION FOR CERTIORARI

This brief is submitted by respondents Peter J. Schultz and Dormitory Authority of the State of New York, in opposition to the petition for a writ of certiorari filed by Bartel Dental Book Co. Inc. and Mapleton House Books, Inc.

Statement of the Case

A. The Facts

Petitioners' recitation of the facts refers not once to the record on appeal and bears little resemblance to it. Accordingly, we review the record facts at some length.

Bartel and Mapleton are affiliated companies engaged in the business of buying and selling used books and periodicals (A-8, 310).* Mapleton leased space for its business at 112 Crown Street in Brooklyn. Until it was condemned, 112 Crown Street was owned by Bartel.

The Dormitory Authority is a public benefit corporation of the State of New York, and Schultz is its Deputy Executive Director (A-7, 9, 320). The Dormitory Authority's principal purpose is to promote higher education in New York by building and providing dormitories and other facilities for the benefit of state colleges and universities (A-57). Schultz directed the Dormitory Authority's efforts, through state condemnation proceedings, to acquire title to block 1294 in in Brooklyn for the construction of facilities for Medgar Evers College, a part of the City University of New York (A-9, 10).

The Dormitory Authority commenced condemnation proceedings in 1983. As part of that process, the Dormitory Authority negotiated with the various fee- and leaseholders, including petitioners, in an effort to reach agreed-upon values for their fee and fixture claims. Although no federal or state statute required it to extend any relocation

* References A- are to Joint Appendix on appeal.

benefits at all, the Dormitory Authority also negotiated with the occupants of the premises in order to reach agreement on the costs of relocating their premises.

These negotiations resulted in a settlement of all fee and fixture claims submitted in the condemnation proceeding (A-9).* Once those claims were withdrawn, the state court granted the Dormitory Authority title to the land in August, 1983.

With Mapleton, however, and only with Mapleton, the Dormitory Authority was unable to agree as to the reasonable cost of relocation. The Dormitory Authority offered $654,050—the amount for an "undocumented, self-move" recommended by one of its independent appraisers under the procedures used by the Dormitory Authority in negotiating relocation expenses with all of the condemnees on the Brooklyn site (A-66-67, 207-09). Mapleton, however, was unwilling to budge unless it received several times that amount (A-60-67). Faced with this intransigence, the Dor-

* Petitioners' statement of facts omits any mention of the agreement under which Bartel and Mapleton settled their fee and fixture claims during the condemnation proceedings (A-39-55). Pursuant to the settlement agreement, Bartel was compensated for the taking of its land, and it released the Dormitory Authority from "all claims made or which could have been made" in the condemnation proceeding (A-41). Mapleton was paid for its fixture claim and, in contrast to Bartel, expressly reserved its claim, if any, for relocation expenses (A-41-42, 43). The releases executed by Bartel and Mapleton also make clear that Bartel released the Dormitory Authority of all claims. Bartel executed a general release with no reservation whatsoever (A-55). Mapleton, on the other hand, expressly reserved its right later to assert "any claim for relocation costs" (A-54). In view of Bartel's settlement and release, the Second Circuit affirmed the district court's finding that Bartel's federal claims—which were all predicated on an asserted underlying right to relocation expenses—were patently frivolous. (*See* Appendix to Petition for Certiorari ("Pet. App."), at 5a, 6a.) Bartel does not seek review of this ruling.

mitory Authority was required to seek Mapleton's eviction so that construction on the site could go forward.

B. The State Court Proceedings

After the negotiations with Mapleton over relocation costs proved fruitless, the Dormitory Authority finally moved, in April of 1984, to seek Mapleton's eviction. Mapleton resisted vigorously.

On May 7, 1984, after considering the papers and hearing arguments from both sides, the Supreme Court of New York, Kings County, granted the Authority's application and ordered Mapleton to vacate the premises no later than May 10, 1984 (A-71-74).

Mapleton then embarked on a succession of motions to stay, motions to reargue, appeals and special proceedings, all with the aim of putting off the eviction. Those efforts began on May 10, 1984, when Mapleton moved to reargue the Supreme Court's order and for a stay pending reargument. In seeking reargument, Mapleton contended that any eviction prior to a "plenary hearing" on its claim for relocation expenses constituted a violation of its due process rights (A-81). The Supreme Court rejected the argument and denied Mapleton's motion on May 16 (A-90).

Meanwhile, Mapleton appealed the May 7 eviction order to New York's Appellate Division, Second Department (A-91-105), from which it sought another stay of eviction pending determination of the appeal. The Appellate Division granted a stay on June 4, 1984 but only "on condition that [Mapleton] remove from the premises in question on or before September 1, 1984 peremptorily" (A-106).

Faced with this latest delay, on July 3, the Dormitory Authority moved before the Appellate Division to vacate the temporary stay. In seeking to maintain the stay, Mapleton again raised its due process arguments under the Constitutions of both New York and the United States (A-103-04). Those arguments were rejected by the Appellate Division on July 27, when the stay was lifted and the order directing Mapleton to be removed involuntarily was restored (A-107). Mapleton was not about to give up, however. On September 12, 1984, it sought a temporary restraining order from the Appellate Division against the imminent eviction. The Appellate Division unanimously denied the application (A-36-37, 108-09).

The same day, the Sheriff of the City of New York began to remove Mapleton's books from the premises (A-16-17). Undaunted, Mapleton turned again to the Kings County Supreme Court, where it commenced an Article 78 proceeding and applied for a temporary restraining order against the removal already in progress. This application for a temporary restraining order also was denied (A-37, 120-21). Shortly thereafter, on September 21, 1984, the Supreme Court heard opposing counsel on the preliminary injunction sought by Mapleton (A-122-140). The injunction was denied, and Mapleton subsequently abandoned the Article 78 proceeding.

Once these remarkable efforts to remain in possession of its former premises had failed, Mapleton also lost interest in its appeal of the original eviction order. On March 14, 1985 the Dormitory Authority moved to dismiss the appeal for failure to perfect the appeal in a timely

fashion—over ten months. Despite Mapleton's opposition, on April 19, 1985, the Appellate Division granted the motion (A-147).

C. The Federal Complaint

In their federal action, petitioners alleged a potpourri of twelve causes of action against Schultz, the Dormitory Authority and the other defendants herein. Only the first, second and eighth of these, however, were alleged to arise under federal law; pendent jurisdiction was asserted as to the rest.

Plaintiffs' First Claim sought damages solely against Schultz, an officer of the Dormitory Authority. In essence, it alleged that Schultz was responsible for the negotiation of relocation "expenses," "benefits" and "claims" with the various occupants of the condemned site, but that Schultz took a "personal dislike" to plaintiffs' officers (A-10), and "wrongfully and maliciously refuse[d] to apply or give the same relocation benefits to plaintiffs as [the Dormitory Authority] did to other claimants" (A-11). Although petitioners alleged no discriminatory motive or effect, they claimed that Schultz's conduct constituted an unequal application of the law and thus was actionable under 42 U.S.C. § 1983.

The Second Claim was brought against both Schultz and the Dormitory Authority, again under Section 1983 and the Fourteenth Amendment (A-12-14, 15, 46-47). The thrust of the Second Claim was that petitioners were "denied due process of the law" by the failure to receive a "plenary" or "evidentiary" hearing on their claim to relocation expenses, prior to eviction (A-12, 14, 15-16).

The third federal claim, the Eighth Claim, averred that petitioners failed to receive "just compensation" for the relocation of their property as purportedly required by the Constitutions of the United States and the State of New York (A-24). The Eighth Claim did not assert that the Dormitory Authority "took" or "condemned" the books, but only that the petitioners suffered uncompensated damages as a consequence of the Authority's removal and subsequent storage of these items.

D. The Proceedings Below

Respondents moved before the district court to dismiss the complaint. In support of their motion, they submitted an affirmation and presented documentary evidence to the court detailing the course of the condemnation proceeding and the state court litigation (A-33-147). And the petitioners submitted an extensive affirmation, together with documentary evidence, as well (A-190-248). At oral argument, the district court advised petitioners that respondents' motion would be treated as one for summary judgment, and gave counsel the opportunity to submit further papers in opposition to the motion. Petitioners declined the offer. (A transcript of the oral argument is annexed to respondents' brief to the Second Circuit.)

On August 27, 1985, the district court granted summary judgment to defendants and imposed sanctions on plaintiffs and their counsel under Rule 11, Fed. R. Civ. P.

The court held, first, that all of Bartel's claims were frivolous in light of Bartel's settlement agreement and release (Pet. App. 15a). It then held that *all* of Mapleton's federal claims "were raised, or could have been raised, in the state court proceedings" and therefore were barred by

res judicata under *Migra* v. *Warren City School District Board of Education*, 465 U.S. 75 (1984), *Allen* v. *McCurry*, 449 U.S. 90 (1980), and a number of controlling authorities from and within the Second Circuit (Pet. App. 15a-17a).

The court did not, however, rely solely on *res judicata*. It went on to hold that petitioners were not denied due process because they had no federal or state constitutional or statutory right to relocation expenses to which procedural due process guarantees could attach (Pet. App. 18a). And, on the affidavits submitted by both sides, it ruled that plaintiffs' equal protection claim against Schultz could not survive the absence of any showing "that Schultz adopted different criteria" in offering relocation expenses to the various condemnees, including Mapleton (*id.*).

The court determined that all of plaintiffs' claims were frivolous, except for Mapleton's equal protection claim against Schultz. Thus, in imposing sanctions under Rule 11, the court denied respondents the recovery of those attorneys' fees incurred in the defense of Mapleton's first claim.

On March 12, 1986, the Second Circuit affirmed in a unanimous opinion. On the basis of the settlement agreement and release, it first ruled that "[t]he district court properly found Bartel's claims to be frivolous" (Pet. App. 5a). It also determined that the district court had properly applied New York's law of *res judicata*, as required under *Migra*, to bar the reassertion of Mapleton's federal claims in federal court. In so ruling, the Second Circuit reviewed the record and found that Mapleton had received a "full and fair opportunity" to litigate its federal claims in the numerous prior state court proceedings. (Pet. App. 6a-7a).

Although no more was required, the Second Circuit also upheld the alternative grounds for summary judgment set forth by the district court. Thus, it ruled that petitioners' due process claim could not survive the absence of any right, in either federal or state law, to relocation expenses in the context of a condemnation. Moreover, the Second Circuit noted, even if such a right existed, the record contained "ample proof" that Mapleton received the basic requirements of due process—notice and the opportunity to be heard on the issue of relocation expenses (Pet. App. 7a-8a & n.2). Petitioners' equal protection argument was also rejected—the Second Circuit found it "frivolous" (Pet. App. 8a).

The Second Circuit gave a ringing endorsement to the district court's discretionary award of attorneys' fees under Rule 11. Indeed, it held that the court "probably would have erred if it had *not* awarded attorneys' fees . . ." (Pet. App. 9a). Pursuant to its authority under Rule 38, Fed. R. App. P., the Second Circuit directed petitioners and their counsel to pay respondents double costs and attorneys' fees for having brought a thoroughly frivolous appeal.

For these petitioners, it is not enough that they were rebuked by the district court, and again by the Second Circuit, for consuming judicial resources on an action so utterly without merit. They would have the respondents —and this Court—address patently frivolous contentions yet a third time. But that is not the purpose of certiorari. There simply is no genuine or novel issue for this Court to review.

REASONS FOR DENYING CERTIORARI

I

The determination that all of Bartel's claims are barred by settlement and release presents no issue worthy of certiorari.

The district court found that petitioner Bartel's claims were frivolous because "Bartel executed a release and an agreement settling *all* its claims against the Authority" (Pet. App. 15a; emphasis added). Applying traditional principles of state contract law, the Second Circuit affirmed (Pet. App. 5a-6a).

Clearly, the determination that Bartel's settlement agreement and release was a bar to all of its claims poses no unsettled question of law, no conflict in the law of the circuits, and no legal issue of particular importance to future litigants. Indeed, even Bartel does not seek certiorari to review the lower courts' determination concerning the settlement agreement and release. Because this unchallenged ruling is fatal to every aspect of Bartel's claims, there is no reason for this Court to review any of the contentions raised by Bartel in its petition.

II

In affirming summary judgment, the Second Circuit applied the standard for claim preclusion adopted by this Court.

In *Migra* v. *Warren City School District Board of Education*, 465 U.S. 75, 85 (1984), this Court held that federal district courts hearing Section 1983 actions should apply the law of the forum state when deciding matters of claim preclusion. *See also Allen* v. *McCurry*, 449 U.S. 90 (1980). As the Second Circuit found, that is precisely what the district court did when it ruled that petitioners' federal claims were barred under New York's law of *res judicata* (Pet. App. 6a, 7a).

Petitioners do not assert, as they cannot, that this holding constitutes a departure from the jurisprudence of this Court, or that it conflicts with any rule adopted in other circuits. Rather, they contend that preclusive effect should not have been extended to the prior state litigation because Mapleton did not have a "full and fair opportunity" to litigate its federal claims in state court (Pet., at 12).

Yet, on the basis of the full record before it, the Second Circuit explicitly determined that Mapleton "had a 'full and fair opportunity' to litigate the claims brought here" (Pet. App. 7a n.1). Petitioners do not even attempt to suggest that this finding lacked support in the record. In fact, the record amply demonstrated that petitioners had their day in state court not only once, but in several proceedings.

Certiorari is not warranted to review this unremarkable, and plainly correct, determination.

III

Both courts below correctly determined that petitioners had no right to relocation expenses under federal or state law.

In holding that petitioners' rights to due process had not been violated, both courts below ruled that petitioners had no substantive right to relocation expenses to which the procedural protections of the Constitution could possibly attach (Pet. App. 7a-8a, 18a). Petitioners now assert that this conclusion was "contrary to well established law of this Court and the Constitution" (Pet., at 8).

Petitioners are wrong. In two unanimous opinions from which this Court has never deviated, it was held that consequential damages in general, and relocation expenses in particular, are not compensable under the Fifth Amendment where, as here, there has been a complete taking of the condemnee's property. *United States* v. *Westinghouse Electric & Mnf'g Co.*, 339 U.S. 261, 264 (1950); *Mitchell* v. *United States*, 267 U.S. 341, 344-45 (1925). And, to the extent that the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601, *et seq.*, now provides a *statutory* right to relocation benefits, it only applies, as petitioners concede, to federally-financed condemnation proceedings. (Pet., at 9). Petitioners do not assert that there was any federal role in *this* condemnation.

In their search for some substantive right to relocation expenses, petitioners also argue—for the *first* time in this action—that state law grants them such expenses under

Section 74-b of the New York State General Municipal Law (McKinney's Consolidated Laws of New York, West Publishing). There is no reason for this Court to grant certiorari to review such a frivolous contention. In their brief to the Second Circuit (at 23, 24, 27), petitioners repeatedly conceded that there is *no* New York statute that requires the Dormitory Authority to provide relocation expenses, and so the courts below held (Pet. App. 8a, 18a). The statute which petitioners appear to have suddenly discovered applies only to "municipal corporations" (Pet. App. 23a). The Dormitory Authority, on the other hand, is a public benefit corporation organized not under the laws of any municipality, but under the authority of the State of New York.

IV

In granting summary judgment on petitioners' equal protection claim, the court below followed the accepted and usual course of judicial proceedings.

As an independent basis for granting summary judgment to respondents on petitioners' equal protection claim, the district court held that petitioners had made no showing "that Schultz adopted different criteria in determining the amount [of relocation expenses] to be offered to Mapleton from the criteria used to establish offers to other claimants" (Pet. App. 18a).

On appeal to the Second Circuit, petitioners contended that the district court's ruling should have been reversed because Mapleton did not have the opportunity, through discovery, to adduce facts in support of the claim as de-

scribed in the complaint. The Second Circuit rejected this argument, holding that because petitioners failed to raise a "genuine issue as to any material fact, [the Dormitory Authority] was entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)" (Pet. App. 8a).

In raising the same issue again before this Court, petitioners now assert certiorari should be granted because the decision of the district court to deny discovery was an "abuse of procedural due process" (Pet., at 11). Like so many of petitioners' arguments, this one also is frivolous.

First, there has never been a dispute as to what took place in the state court litigation that preceded the federal complaint. Thus, discovery was irrelevant to the district court's ruling that the equal protection claim was barred by *res judicata*.

Second, petitioners can blame only themselves for their failure to raise a genuine issue of fact sufficient to defeat summary judgment on the merits of their equal protection claim. When respondents submitted evidence in support of their motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., petitioners clearly anticipated that the motion might be treated as one for summary judgment, and therefore chose to submit extensive documentary evidence as well. At oral argument, the district court advised petitioners' counsel that respondents' motion would in fact be treated as one for summary judgment under Rule 56, Fed. R. Civ. P., and expressly offered petitioners the opportunity to submit even further submissions (*see* Respondents' Brief on Appeal, Appendix). Petitioners did not accept the offer, nor did they assert any need for discovery. Under these

circumstances, petitioners are ill-pressed to argue that their failure to raise any genuine issue of fact sufficient to survive summary judgment constituted a departure from accepted judicial norms.*

V

Certiorari is inappropriate to review the district court's sound exercise of discretion under Rule 11.

Exercising its discretionary power under Rule 11, Fed. R. Civ. P., the district court awarded respondents attorneys' fees expended by them in the defense of all claims except Mapleton's equal protection claim. In upholding the district court's exercise of discretion, the Second Circuit held (Pet. App. 9a):

> Mapleton's equal protection claim against Schultz was the only claim raised for the first time in its federal action. That claim was not supported by any legally relevant facts. Mapleton's other claims had already been rejected by the New York courts and were clearly

* Even on the face of the complaint, moreover, petitioners' equal protection claim was clearly defective as a matter of law. Assuming *arguendo* that petitioners had a substantive right to relocation benefits in the first instance, their interest in such expenses "has never been held to rise to the level of a fundamental constitutional right, so the 'close scrutiny' approach . . . is inappropriate here." *Cahill* v. *Cedar County, Iowa*, 367 F. Supp. 39, 42 (N.D. Iowa 1973) (footnote omitted), *aff'd*, 419 U.S. 806 (1974). Petitioners' complaint did not allege that others received relocation benefits and petitioners did not for some constitutionally impermissible reason (such as membership in a particular race or as a punishment for the exercise of constitutionally protected rights). *See, e.g., Bell* v. *Sellevold*, 713 F.2d 1396, 1401-02 (8th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984). Nor was there any allegation that respondents applied different criteria in performing clearly discretionary administrative action. In these circumstances, the Second Circuit correctly determined that the Dormitory Authority's action simply was not reviewable under the equal protection clause.

without merit. Furthermore, a competent attorney could not form a reasonable belief that any of these claims were "warranted by existing law or a good faith argument for extension, modification, or reversal of existing law." Fed. R. Civ. P. 11. *See also Eastway Construction Corp.* v. *City of New York,* 762 F.2d 243, 253-54 (2d. Cir. 1185).

Petitioners contend certiorari should be granted to review the district court's exercise of discretion on the ground that "if part of a complaint is non-frivolous or meritorious, Rule 11 sanctions are inappropriate" (Pet., at 6). Petitioners cite not a single authority for their peculiar construction of Rule 11. Rule 11 by its terms requires "the pleading" to be "well grounded"—not merely some portion of the pleading. A plaintiff should not be permitted to escape sanctions properly imposed for the bringing of numerous frivolous claims simply because one of its claims —although meritless—was found barely to rise above the level of frivolity. Contrary to petitioners' fear, no party who commences an action in good faith will be "chilled" by this decision, particularly since attorneys' fees were *not* awarded with respect to the one meritless claim found not to be entirely frivolous.

Petitioners further suggest that the Second Circuit's decision conflicts with the decision of the Fourth Circuit in *Nelson* v. *Piedmont Aviation, Inc.,* 750 F.2d 1234 (4th Cir. 1984), *cert. denied,* 105 S.Ct. 2358 (1985), and the decision of the Seventh Circuit in *Harry F. Chaddick Realty Inc.* v. *Maisel,* 762 F.2d 534 (7th Cir. 1985). No such conflict exists. In *Nelson,* the Fourth Circuit simply upheld the district court's discretion in not awarding sanctions

where the plaintiff's single claim rested on a non-frivolous statutory construction in a case of first impression. 750 F.2d at 1237-38. And in *Harry F. Chaddick*, the Seventh Circuit ruled merely that a district court did not abuse its discretion in denying defendants' Rule 11 motion where the first of plaintiff's claims "presented some very difficult problems" and the second claim was not found to be frivolous. 762 F.2d at 541-42.

The decision upheld by the Second Circuit was an award squarely within the discretionary authority of the trial court. That discretion, as the Second Circuit found, was exercised appropriately. There is no basis for consuming the resources of this Court on yet another review of the trial court's discretion.

Conclusion

Petitioners already have brought one frivolous action and one frivolous appeal. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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